No. 82-1936

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

HUGO RODRIGUEZ,
Petitioner,

vs.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
GRANCOLOMBIANA (NEW YORK), INC.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is the Jones Act (Title 46, U.S. Code § 688) and the General Maritime Law of the United States applicable to a dispute which has no substantial contacts with the United States?

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Respondents Flota Mercante Grancolombiana, S.A. and Grancolombiana (New York), Inc. respectfully request that this Court refuse to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this matter.

STATEMENT OF THE CASE

Petitioner, a Colombian seaman, has filed suit for injuries arising out of an accident which occurred while he was employed aboard the Colombian flag vessel, *Ciudad de Cali*, on May 18, 1979. Respondent Flota Mercante Grancolombiana, S.A. (hereinafter "Flota") is a Colombian corporation, owner of the vessel, and employer of the petitioner.

Respondent Grancolombiana (New York) Inc. (hereinafter "Granco") is a New York corporation which acts as general agent for Flota, assisting in providing necessary services to Flota's vessels while they are in U.S. ports.

At the time of petitioner's accident the vessel was in San Francisco Bay. As a result of his injuries petitioner was treated at San Francisco General Hospital for approximately three months. Following his treatment, petitioner returned to Colombia where he presently resides.

Petitioner was born in Manizales, Colombia and signed his employment contract with Flota in Santa Marta, Colombia. The contract provides that it will be interpreted under Colombian law, and that the parties recognize the jurisdiction of the Colombian courts over any dispute which may arise under the contract. Colombian laws provide that petitioner is entitled to receive free medical care and treatment in Colombia for any injury received aboard the vessel.

The *Ciudad de Cali* is a registered vessel of Colombia and thereby flies the Colombian flag. All of the crew members aboard the vessel at the time of petitioner's injury were Colombian citizens and residents, with the exception of the electrician who was a Polish citizen. All of the other members of the crew had signed their employment contracts with Flota in Colombia, and had joined the vessel at the beginning of the subject voyage in Buenaventura, Colombia. At the time of petitioner's injury the vessel was on a voyage which began and ended in Buenaventura, Colombia.

Respondent Flota is a relatively large shipowning corporation with its corporate headquarters in Bogota, Colombia, where it maintains its base of operations. All of Flota's officers and managers reside in Colombia, and control over

all of its functions is centered in Colombia. Flota employs over 300 individuals in Bogota including its operational staff, financial consultants and accountants, corporate officers, long-term planning, research and development departments, its naval architect staff, and all other necessary support personnel.

At the time petitioner filed suit, respondent Flota was 80 percent owned by the Federation of Coffee Growers of Colombia, with the remaining 20 percent owned by the Central Bank of Ecuador. In 1979, Flota owned 29 vessels, 13 of which called at U.S. ports sometime during that year. Those 13 vessels also stopped at ports in Canada, Mexico and various South American countries.

In 1979, Flota also had approximately 50 other vessels under charter, or operated in conjunction with other shipowners. These 50 vessels, combined with the 29 vessels Flota owned, called at ports in countries all over the world.

In 1979, the *Ciudad de Cali* would normally call at 15 different ports during a voyage, only four of which were in the U.S. During its normal 72-day voyage to and from Colombia the vessel would only spend approximately six days in U.S. ports.

As a result of its operations in 1979, Flota grossed $93,493,984, but suffered a net loss of $9,210,859. It was impossible for Flota to determine whether a net gain or loss had been suffered specifically from calls at U.S. ports, in light of the fact that every voyage made by vessels calling at U.S. ports also called at ports in other countries.

As a general agent for Flota, Granco provides the necessary shoreside support to the vessels owned, chartered and otherwise operated by Flota. The profits and losses of

Granco are not reflected in Flota's records or accounts, nor does Granco own any stock in Flota.

There are two owners representatives under contract with Granco who assist in providing shoreside support for Flota's vessels. One is located in San Francisco and the other in New Orleans, and they service the ports on the West and Gulf coasts, respectively. These owners representatives deal with Granco with respect to such matters as payment of locally incurred charges. However, the owners representatives are in contact with Flota's headquarters in Colombia with respect to all operational matters. The practice of having owners representatives stationed in ports where vessels call is common among foreign shipowners, there being approximately 18 other foreign shipowners who have owners representatives in San Francisco.

Following discovery ordered by the District Court, respondents had moved to dismiss on the basis that United States law was not applicable, or in the alternative, on the basis of *forum non conveniens*. The District Court granted respondent's motion, and petitioner appealed. The Ninth Circuit Court of Appeals upheld the lower court in a majority decision filed on March 15, 1983, a concurring opinion filed on April 5, 1983 and in a subsequent order filed on April 25, 1983.

The Court of Appeals stated that petitioner had identified three factors which he asserted justified the application of the Jones Act or the General Maritime Law of the United States to this case. They were:

(1) The fact that plaintiff was injured while in U.S. waters;

(2) That Flota had substantial operational contacts in the United States; and

(3) That the litigation in which Flota has been a party in United States Courts was an indication of Flota's business relation and contact with this country.

The Ninth Circuit held that the fact that petitioner was injured in the United States was of little significance. It also held that evidence was uncontradicted that Flota's base of operations was in Bogota, Colombia. Neither Flota's gross earnings from operations, which only in part involve U.S. shipments, nor its advertising or other minimal contacts, established a base of operations in the United States. Finally, the Circuit Court concluded that the fact that Flota had been involved in litigation in this country was irrelevant.

After the Ninth Circuit had issued its opinions, petitioner advised the Ninth Circuit that the District Court had in fact concluded that no cause of action existed under the Jones Act or the General Maritime Law, and further that maintenance of jurisdiction was not proper under *forum non conveniens*. As a result, the Ninth Circuit agreed with petitioner that remand on the *forum non conveniens* issue was not necessary, and it then affirmed the District Court's order in total. Petitioner then proceeded to file his Petition with this Honorable Court.

THE ARGUMENT

NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS IN DECIDING CASES OF THIS TYPE. THEIR DECISIONS MERELY REFLECT THE DIFFERENCE IN THE FACTS OF EACH CASE

Petitioner has stated that certiorari should be granted as different tests have been applied in determining whether

the Jones Act and the General Maritime Law of the United States applies in similar cases. Respondents respectfully disagree and submit that the Circuit Courts have consistently applied the factors which are to be considered in ruling on this question. The result has been the development of uniform law in this area which necessarily varies only to the extent of the difference in the facts of each case. The Ninth Circuit in this case had similarly considered all of the relevant factors and arrived at a proper conclusion.

This Court identified the eight factors to be considered in determining the choice of law question as: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the independent shipowner; (5) the place of contract; (6) the accessibility of the foreign forum; (7) the law of the forum; and (8) the base of operations of the shipowner. *Lauritzen v. Larson*, 345 U.S. 571, 583-91 (1952); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

This Court has given the Circuit Courts guidance in weighing and evaluating the various contacts. The place of the wrongful act and the place of contract have been identified as less significant. *Lauritzen*, 345 U.S. at 583-84, 588-89. This Court has stated, however, that the law of the flag is of "cardinal importance" in determining choice of law, as it is the "most venerable and universal rule of maritime law". *Lauritzen*, 345 U.S. at 584.

This Court has also stated that the factors are not to be applied mechanically, nor are they inclusive of all factors which may be considered by the courts. *Rhoditis*, 398 U.S.

at 308-309. In response, the Circuit Courts have indeed concluded that the various factors will have varying degrees of merit depending upon the facts of each case. *Moncada v. Lamuria Shipping Corp.*, 491 F.2d 470, 472 (2nd Cir.) *cert. denied*, 417 U.S. 947 (1974); *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 85 (9th Cir. 1980), *cert. denied* 451 U.S. 920 (1981).

Petitioner has argued that the Ninth Circuit in this case applied a different standard than the one used by the Second Circuit in *Bartholomew v. Universe Tank Ship, Inc.*, 263 F.2d 437 (2nd Cir. 1959), *cert. denied* 359 U.S. 1000 (1959), the Fifth Circuit in its decision in *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied* 454 U.S. 816 (1981), and the Eleventh Circuit in the case of *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983). Respondents respectfully submit that the holding of the Ninth Circuit in this case is in accord with the decisions of the other Circuits.

The Ninth Circuit properly weighed the factors to be considered in determining whether the Jones Act or the General Maritime Law was applicable. Having found no substantial contacts, the Ninth Circuit affirmed the action of the District Court in dismissing this case. Had the other Circuits been asked to evaluate the same facts, they similarly would have concluded that U.S. law did not apply.

In *Bartholomew*, the Second Circuit recognized that it was to ascertain, weigh and value the points of contact between the transaction and the governments whose competing laws were involved. 263 F.2d at 439. The Second Circuit concluded, rightfully so, that the facts in that case warranted the application of U.S. law. In *Bartholomew*,

U.S. citizens owned all of the stock of the shipowning corporation. The officers of that corporation were U.S. citizens, and its principal place of business, i.e., its base of operations, was in the United States. The plaintiff-seaman had signed his articles in the United States and was to sail on a vessel whose voyage began and ended in the United States. In addition, plaintiff was deemed to be a resident and domiciliary of the United States, and had been injured in the United States. Obviously, a significant number of substantial contacts were present which justified application of the Jones Act.

In this action the Ninth Circuit was presented with very different facts. The only contact favoring application of U.S. law was the place of the alleged wrongful act, i.e., the petitioner was injured while in U.S. waters. Contrary to the facts in *Bartholomew,* Flota's ultimate owners are Colombian and Ecuadorian, not U.S. citizens. Flota's base of operations is clearly centered in Bogota, Colombia where over 300 individuals are employed in the daily operations of the company. Petitioner is a Colombian citizen, who resides there while receiving benefits under Colombian law. In addition, the voyage during which petitioner was injured began and ended in Colombia. There simply are no substantial factors which justify application of United States law to this case.

The facts before the Fifth Circuit in *Fisher v. Agios Nicholaos V,* 628 F.2d 308 (5th Cir. 1980), *cert. denied* 454 U.S. 816 (1981), were also very different from the facts in this case. The Fifth Circuit found that at the time of the foreign seaman's injury U.S. contacts were the source of all of the shipowner's revenue, and the entire

service of the vessel. This was due to the fact that the foreign shipowner had just begun operations shortly before the seaman's injury and only owned one vessel. The only business venture of that shipowner prior to the injury was a voyage to and from the United States. As a result, the Fifth Circuit concluded that at the time of the seaman's injury the shipowner's base of operations was in the United States.

In addition, the seaman in *Fisher* had made a good faith claim for wrongfully withheld wages under 46 U.S.C. § 596. Having jurisdiction over part of the controversy, it was entirely proper for the District Court to take jurisdiction over the entire matter thereby avoiding multiplicity of suits. *Gkiafis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967).

Contrary to the facts in the *Fisher* case, Flota earns but a small percentage of its revenue from calls at U.S. ports. Flota's base of operations is in Colombia where all of its management and operational decisions are made. In addition, Flota's operations are truly world wide in scope. It owned, chartered or operated 79 vessels in 1979, only 13 of which ever called at U.S. ports. Finally, petitioner did not make a wage claim under 46 U.S.C. § 596, which would have required the District Court to exercise jurisdiction.

Petitioner has also alleged that the decision of the Eleventh Circuit in *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983), is contrary to the holding of the Ninth Circuit in this case. In *Szumlicz*, the seven factors identified in *Lauritzen* did not favor application of U.S. law. However, the Eleventh Circuit did find

that shipowner's base of operations was in the United States and relying on *Rhoditis* affirmed the District Court's conclusion that the Jones Act applied.

The Eleventh Circuit noted that the vessel in question was employed in voyages which began and ended in Florida, while calling at other U.S. ports. The shipowner also maintain "offices" in Florida and New York, in addition to employing local agents. Shipowner also employed a physician in Florida to treat its seaman.

Contrary to the facts in *Szumlicz*, respondent Flota's vessel was on a voyage which began and ended in Colombia. Flota does not maintain "offices" in the United States, but rather has contracted with a general agent, Granco, an independent corporation, which, with the assistance of two owners representatives, services local needs of Flota's vessels while in U.S. ports. Further, contrary to *Szumlicz*, Flota does not employ physicians in the United States.

It is clear from the opinion in *Szumlicz* that the Eleventh Circuit would not have applied U.S. law to the facts of this case. It cited with approval the decision in *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982), where the *Lauritzen* factors strongly favored application of foreign law, where the sole factor favoring application of United States law was the place of the wrongful act, and where shipowner had no substantial base of operations in the U.S. On these facts the Fifth Circuit concluded that U.S. law would not apply. The exact same facts were presented to the Ninth Circuit in this case, and it similarly concluded that U.S. law should not apply. The Eleventh Circuit

would have apparently come to the same conclusion. *Szumlicz*, 698 F.2d at 1195.

In summary, an analysis of the other Circuit Court cases cited by petitioner has not demonstrated any discrepancy between the Ninth Circuit's opinion here and the decisions in other Circuits. The Ninth Circuit properly evaluated and weighed the facts looking for substantial contacts. Having found none which would require the exercise of jurisdiction, the Ninth Circuit affirmed the District Court's dismissal.

IT WAS PROPER FOR THE NINTH CIRCUIT TO CONCLUDE THAT FLOTA DID NOT HAVE A SUBSTANTIAL BASE OF OPERATIONS IN THE UNITED STATES

The Ninth Circuit had determined that the number of contacts that Flota had with the United States, did not constitute a base of operations in the United States. In so concluding, the Ninth Circuit emphasized that Flota's actual base of operation was in Bogota, Colombia where all its officers and managers resided, where all its business decisions were made, and from where its vessels began and ended their voyages.

The Ninth Circuit stated that Flota's vessels did gross an "impressive" amount of income in calling on ports of the United States. In doing so, the Ninth Circuit was referring to the $93,483,984 that Flota grossed in income from ships which called at U.S. ports in 1979. However, respondents wish to make clear that the Ninth Circuit was advised that those same vessels also called at ports in Canada, Mexico and South America. The exact amount of income from U.S. operations alone could, therefore, not be broken down by

Flota. Further, Flota in fact suffered a net loss from the operations of those vessels in the amount of $9,210,859. It is, therefore, likely that Flota suffered a net loss from its "U.S. operations".

The Ninth Circuit pointed out that assistance rendered to Flota by its U.S. agent, or its owners representatives, was of no significance. All shipowners must employ local agents to assist them in the operations of their vessels in other countries. *Merren v. A/S Borgestad*, 519 F.2d 82 (5th Cir. 1975); *Manlugon v. A/S Facto*, 419 F.Supp. 550 (S.D. N.Y. 1976). As a result, the employment of Granco and owners representatives should not be considered to constitute a base of operations.

In response to petitioner's argument, the Ninth Circuit also concluded that the fact that Flota advertised in U.S. publications and is listed in San Francisco telephone directories did not establish a base of operations. All foreign shipowners must advertise in order to compete with each other, and U.S. flag shipowners. Such actions are not substantial contacts with the United States, especially when compared with the obvious base of operations that Flota maintains in Bogota, Colombia where its day-to-day operations are conducted.

Petitioner also suggested to the Ninth Circuit that the fact that Flota had been involved in litigation in the United States was significant in determining whether it maintained a base of operations here. Respondents agree with petitioner that this Court in *Rhoditis* held that the factors listed in that case and *Lauritzen* were not intended to be exhaustive. Respondents submit, however, that the number of times

that Flota has been involved in litigation in the U.S. is not a substantial contact.

In 17 of the cases cited by petitioner on page 4 of his Petition, Flota was a defendant in actions brought under the Longshoreman & Harborworkers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, which has an entirely dissimilar standard for determining jurisdiction. In one other case, Flota had been sued for alleged failure to pay wharfage. Thus, in these cases Flota was an unwilling participant in the litigation.

In three other cases, Flota petitioned to review an order of the Federal Maritime Commission. Flota could not have obtained jurisdiction over the FMC in any forum other than U.S. courts.

In another case cited by the petitioner, Flota had filed a petition for limitation of liability following a collision of one of its vessels. This Court has specifically stated that the fact that a foreign shipowner files a petition to limit liability in U.S. courts, is not a basis upon which to conclude that the foreign shipowner is subject to suit here by a foreign seaman.

> "Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not. Furthermore, this application of the limitation on liability brought our practice into harmony with that of all maritime nations, while the application of the Jones Act here advocated would bring us into conflict with the maritime world." *Lauritzen, supra,* 345 U.S. at 592.

Jurisdiction can be obtained over foreign shipowners in a number of situations dependent upon the point of law involved. In addition, foreign shipowners are often forced to litigate in the U.S. in order to resolve disputes with government entities or U.S. citizens. Such litigation should not be considered a basis for the application of the Jones Act or the General Maritime Law as it has no connection with the cause of action alleged by the plaintiff/seaman.

This Court has given specific guidelines as to what shall constitute a basis for the application of the Jones Act and the General Maritime Law to a suit brought by a foreign seaman. The fact remains that none of the significant factors identified by this Court in *Lauritzen* and *Rhoditis* are present in this case.

CONCLUSION

The Circuit Courts have evaluated, counted, weighed and determined that certain of the *Lauritzen/Rhoditis* contacts predominate over others depending on the facts of the case. The *Lauritzen/Rhoditis* factors are obviously still viable and provide the lower courts with sufficient guidance to enable them to arrive at the correct decision despite various and divergent factual situations. However, petitioner had in effect asked the Ninth Circuit to ignore the *Lauritzen/Rhoditis* factors.

Petitioner had asked the Ninth Circuit to rule that any amount of business activity performed by a foreign shipowner in the United States was to be considered significant regardless of the amount of shipowner's business conducted elsewhere, and regardless of where shipowner maintains its base of operations. Simply doing business in the United

States should not result in the application of the Jones Act or the General Maritime Law to disputes of this type. Every foreign shipowner whose vessel calls at U.S. ports does business in the United States, as the presence of the vessel requires that shipowner hire local agents, appoint local owners representatives, advertise its presence, and solicit freight. To hold that the United States law should apply to every foreign shipowner whose vessels call here would be directly contrary to the tenets of *Lauritzen/Rhoditis* which sought to define the limits of our jurisdiction and the domain which each maritime nation may claim as its own. To reduce the applicable standard to one of simply doing business in the United States, as petitioner has suggested, would make our already overcrowded dockets "even more attractive" to foreigners whose internal disputes are of no concern to U.S. citizens and U.S. courts. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981).

The Ninth Circuit in this case has issued an opinion consistent with its decision in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied*. 451 U.S. 920 (1981). In *Phillips* the Ninth Circuit stated that the *Lauritzen* factors "should be applied with sensitivity to the national interests that may be served by the assertion of American maritime law in a particular case." *Phillips*, 632 F.2d at 85.

Respondents respectfully submit that there is no national interest in this suit brought by Rodriguez. Colombia is truly the only nation that has a significant interest in the outcome of this dispute.

The Ninth Circuit considered the fact that the vessel in question was flying a Colombian flag, that it was manned by

a Colombian crew, that the plaintiff was a Colombian citizen and resident, that the potential liability witnesses were all Colombian citizens, that the employment contract was executed in Colombia, that the contract provided for application of Colombian law and that Flota is a Colombian corporation whose contacts with the United States were limited to those required of any ship which calls at U.S. ports. In light of all these facts, the Ninth Circuit reached the proper conclusion. As a result, this Court should decline to issue a Writ of Certiorari.

Dated: June 6, 1983.

Respectfully submitted,

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